

REED SMITH SHAW & McCLAY

1301 K STREET, N.W.

SUITE 1100 - EAST TOWER

WASHINGTON, D.C. 20005-3317

FAX 202-414-9299

WRITER'S DIRECT DIAL NUMBER

202-414-9200

(202) 414-9277

PITTSBURGH, PA
PHILADELPHIA, PA
HARRISBURG, PA
McLEAN, VA
PRINCETON, NJ
NEW YORK, NY

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May 21, 1996

William Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Preemption of Local Zoning Regulation of
Satellite Earth Stations, IB Docket No. 95-59,
FCC 96-78

Dear Mr. Caton:

On March 11, 1996, the Commission issued an Order and Further Notice of Proposed Rulemaking in the above-referenced proceeding. On May 6, 1996, public notice of petitions for reconsideration and clarification of the Commission's Order filed by various parties was published in the Federal Register.

PRIMESTAR Partners L.P. ("PRIMESTAR") submitted comments and reply comments concerning the Commission's Further Notice of Proposed Rulemaking in this proceeding, copies of which are attached hereto. These pleadings explain PRIMESTAR's position with regard to the rule adopted in the Commission's Order. Specifically, PRIMESTAR submits that the Commission should revise its newly adopted rule to create a flat, or per se ban on local regulation of all satellite antennas measuring 1.0 meter in diameter or less. Further, PRIMESTAR agrees with the Satellite Broadcasting and Communications Association of America's ("SBCA") view that the Commission should exercise its exclusive jurisdiction over DTH services pursuant to Section 205 of The Telecommunications Act of 1996. Finally, should a local authority sustain a waiver of the preemption and be permitted to regulate DTH antennas of 1.0 meter or less, its regulatory authority should be given only prospective application.

To the extent that certain of the petitions for reconsideration filed in this proceeding conflict with PRIMESTAR's views as articulated in its comments and reply

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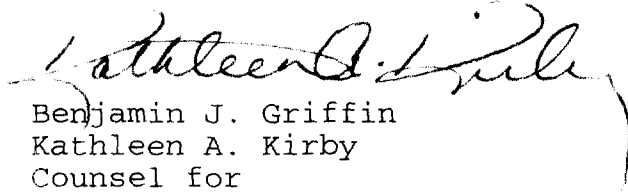
REED SMITH SHAW & McCLAY

William Caton, Acting Secretary
May 21, 1996
Page 2

comments filed in IB Docket No. 95-59, PRIMESTAR opposes those petitions.

Sincerely,

REED SMITH SHAW & McCLAY

A handwritten signature in cursive script, appearing to read "Kathleen A. Kirby", is written over the typed name. The signature is enclosed in a large, hand-drawn right-facing curly bracket.

Benjamin J. Griffin
Kathleen A. Kirby
Counsel for
PRIMESTAR PARTNERS L.P.

KAK:lmh

Attachments

CERTIFICATE OF SERVICE

I, Lynne M. Hensley, a secretary in the offices of Reed Smith Shaw & McClay, hereby certify that on May 21, 1996, I caused to be served by first class mail, postage prepaid, copies of the attached **LETTER OF PRIMESTAR PARTNERS L.P.** on the following:

James F. Rogers
Steven H. Schulman
Latham & Watkins
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
Counsel for Hughes Network Systems and DirecTV, Inc.

Scott Carlson
Assistant City Attorney
City of Dallas
City Hall
Dallas, TX 75201

Diane S. Killory
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
Counsel for the Satellite Broadcasting and
Communications Association of America

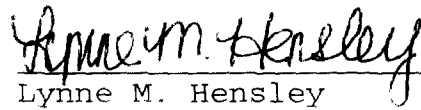
Marvin Rosenberg
Holland & Knight
2100 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20037
Counsel for United States Satellite Broadcasting
Company, Inc.

Mark C. Ellison
Robert E. Jones III
Hardy & Ellison, P.C.
9306 Old Keene Mill Road
Burke, VA 22124
Counsel for AlphaStar Television Network, Inc.

H. Lawrence Hoyt
Boulder County Attorney
P.O. Box 471
Boulder, CO 80306-0471

Michael Sittig
Executive Director
Florida League of Cities, Inc.
201 West Park Avenue
Post Office Box 1757
Tallahassee, FL 32302-1757

Tillman L. Lay
J. Darrell Peterson
Miller, Canfield, Paddock and Stone PLC
1225 19th Street, N.W.
Suite 400
Washington, D.C. 20036
Attorneys for the Local Communities


Lynne M. Hensley

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Preemption of Local Zoning)	IB Docket No. 95-59
of Satellite Earth Stations)	DA 91-577
)	45-DSS-MISC-93

To: The Commission

COMMENTS OF PRIMESTAR PARTNERS L.P.

PRIMESTAR PARTNERS L.P.

Benjamin J. Griffin
Kathleen A. Kirby
REED SMITH SHAW & McCLAY
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005-3317
(202) 414-9200

Its Attorneys

April 15, 1996

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Preemption of Local Zoning
of Satellite Earth Stations

)
)
) IB Docket No. 95-59
) DA 91-577
) 45-DSS-MISC-93

To: The Commission

COMMENTS OF PRIMESTAR PARTNERS L.P.

PRIMESTAR PARTNERS L.P. ("PRIMESTAR"), by its attorneys and pursuant to Section 1.415 of the Commission's rules, 47 C.F.R. § 1.415, hereby submits its comments in response to the Commission's Report and Order and Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹ The Commission's Order adopts revisions to its current rules preempting local regulation of satellite earth stations, see 47 C.F.R. § 25.104. Among the new rules adopted in the Order is a rebuttable presumption against local laws and regulations that restrict the placement or use of relatively small receiving dishes (1.0 meter or less in diameter, or 2.0 meters or less in diameter if installed in commercial areas).

¹ *Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, FCC 96-78 (released March 11, 1996) ("Order" or "Further NPRM").

In light of the directives issued by Congress in the Telecommunications Act of 1996,² and as explained more fully below, PRIMESTAR submits that the Commission should revise its newly adopted rule to create a flat, or per se ban on local regulation of all satellite antennas measuring 1.0 meter in diameter or less. Further, consistent with Congress' mandate, the Commission should revise its rules to preempt in the same manner nongovernmental or quasi-public regulation of small satellite antennas.

I. INTRODUCTION AND SUMMARY

Since 1990, PRIMESTAR has been providing direct-to-home ("DTH") satellite television service using a medium power fixed satellite operating in the Ku-band. PRIMESTAR currently offers 95 channels of entertainment and informational programming, including hit movies, regional sports networks, breaking international and national news, family programming, home shopping, pay-per-view and digital music channels to over one million subscribers. PRIMESTAR subscribers use several different sizes of receive antennas, depending upon their geographic locations. The antenna sizes deployed in the PRIMESTAR system range from 1.0 meter down to .75 meter. In addition, some PRIMESTAR subscribers employ elliptical antennas measuring 1.0 meter along the

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act")

horizontal axis, but with a surface area equivalent to a 0.88 meter circular antenna.

While not technically a direct broadcast satellite ("DBS") service, PRIMESTAR competes directly with existing DBS providers DIRECTV, Inc., United States Satellite Broadcasting Company ("USSB"), and Echostar and soon will face increased competition from new DBS providers as well as from other medium power Ku-band services. PRIMESTAR has attempted to differentiate its service from that of its competitors by, among other things, furnishing reception equipment as part of the service, rather than requiring subscribers to purchase reception equipment. PRIMESTAR suffers from a competitive disadvantage, however, because DBS providers using high power Ku-band satellites can transmit to receiving dishes somewhat smaller than those currently used by PRIMESTAR. DBS satellite antennas typically measure 18 inches in diameter.

As PRIMESTAR and others emphasized in comments filed in response to the Commission's initial Notice of Proposed Rulemaking in this proceeding,³ subscribership to DTH services, particularly DBS-type services, has increased rapidly in recent years.⁴ These services offer subscribers

³ *Preemption of Local Zoning Regulation of Satellite Earth Stations*, 10 FCC Rcd 6982 (1995) ("Notice").

⁴ Some analysts predict that the DBS industry will serve three million subscribers by the end of 1996 and 6 million subscribers by 1999. John Aronsohn, *DBS: Here Today . . . But is it Here to Stay*, The Yankee Group (White Paper), Aug. 1995, at 3.

many of the same satellite delivered video programming services typically available from cable systems, in addition to some offerings not available from cable systems. Both Congress and the Commission have recognized the potential for DTH services to provide effective competition in the market for multichannel video programming distribution.⁵

In order for DTH services to compete effectively against other communications services, DTH users must be able to install, operate and maintain their antennas without substantial interference or delay from local authorities. To the extent local zoning ordinances or regulations, whether governmental or private, prevent or frustrate consumers' ability to install satellite antennas to receive DTH services, the DTH services, and, ultimately, the public, are harmed.

PRIMESTAR submits that only a per se ban on governmental and private regulation of small satellite antennas can ensure that consumers will have the freedom necessary to make the DTH service a viable competitor. Any other rule creates undue uncertainty, and will provide local officials with the opportunity to attempt to justify and enforce burdensome regulations, leaving consumers with the choice of challenging or complying, neither of which is an

⁵ See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket 95-61, FCC 95-491 (released Dec. 11, 1995) ("1995 Cable Competition Report").

attractive option. Moreover, the per se preemption clearly should apply to all satellite antennas -- i.e., those that operate in the high power DBS service and in the medium power fixed satellite service. Finally, PRIMESTAR supports several additional proposed rule changes as set forth in the Petition for Reconsideration/Clarification and Further Comments, filed concurrently in this proceeding by the Satellite Broadcasting and Communications Association of America ("SBCA").

**II. THE TELECOMMUNICATIONS ACT OF 1996 REQUIRES
A PER SE PREEMPTION OF PUBLIC AND PRIVATE
RESTRICTIONS ON SMALL DTH ANTENNAS**

There is a well-established federal interest in facilitating the distribution of satellite services. Satellite services expand both the reach of communications services available and the diversity of programming services, thereby assisting the Commission in its mandate to make communications services available "so far as possible to all the people of the United States."⁶

This general mandate is reinforced and augmented by amendments to the Communications Act contained in the 1996 Act, which create explicit rights to receive satellite signals. Specifically, Section 207 of the 1996 Act directs the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video

⁶ 47 U.S.C. § 151.

programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."⁷

In enacting Section 207, Congress clearly recognized that "state and local regulation can and does interfere with the federal interest in widespread access to all forms of video delivery, and that preemption by the Commission is the appropriate response to such interference with the federal interest." Further NPRM at ¶ 59. As a consequence, the Commission has appropriately concluded that the statute establishes a federal interest in ensuring that the right to construct and use antennas to receive satellite-delivered signals is not unreasonably restricted by local regulation.

A. The Rebuttable Presumption Approach to Local Regulations Should Be Replaced with a Per Se Preemption Rule

In the Further NPRM, the Commission expressed its tentative view that the rule it adopted in the Order with respect to the preemption of local zoning regulations affecting small satellite antennas fulfills the mandates of Section 207 of the 1996 Act. PRIMESTAR disagrees.

In the Order the Commission established a rebuttable presumption that local regulation of small satellite antennas was unreasonable, thereby leaving open the ability

⁷ 1996 Act at § 207.

of local governments to attempt to justify continued regulation.

By directing the Commission to "prohibit" all restrictions that "impair" reception of video programming, however, Congress, through Section 207 of the 1996 Act, set a higher standard for the subset of satellite antennas specific to "direct broadcast services" than the more moderate, rebuttable presumption alternative. PRIMESTAR submits, therefore, that, pursuant to Congress' directive, the Commission must revise its newly adopted rules to create a per se preemption of local laws and regulations governing satellite antennas measuring one meter in diameter or less.

Had Congress intended the Commission to stop short of a per se preemption of local law and regulation affecting small DTH antennas, it would have so indicated. In several other instances, where Congress wished to permit local authorities to regulate, it clearly expressed that intent.⁸

Not only is the rebuttable presumption mechanism inconsistent with Congress's intent, it will not provide satellite users with the relief they need. Any health, safety or aesthetic considerations underlying such local regulations simply are not applicable to small DTH dishes, and such regulations unnecessarily impede the important federal interests described previously.

⁸ See, e.g., 47 U.S.C. §§ 251(d)(3), 254(f).

The record in this proceeding clearly illustrates that many municipalities have no hesitancy in disregarding the Commission's rules, imposing complicated rules and requirements of their own on satellite users, and generally impeding access to satellite communications. If a presumption is rebuttable, far too many users will find themselves mired in proceedings defending their right to avail themselves of satellite services -- proceedings that users of terrestrial systems never have to experience.

The rebuttable presumption approach will deter consumers from fully embracing DTH services. The very prospect that a consumer may have to fight City Hall all the way to Washington in order to enjoy satellite services will seriously hamper the standing of satellite services as a true user-friendly consumer electronics product. Consistent with the government's interest in facilitating the proliferation of satellite services, therefore, PRIMESTAR submits that Section 25.104(b)(1)(B) should be revised to preempt restrictions on small satellite antennas per se, with a clearly defined waiver procedure as the safety valve for the truly extraordinary and unique situations.

B. The Commission Should Adopt Its Per Se Preemption Proposal for Nongovernmental Restrictions

PRIMESTAR agrees that Section 207 requires the Commission to promulgate a new rule prohibiting enforcement of nongovernmental restrictions on small-antenna video reception. Section 207 is not limited by its terms to

governmental restrictions such as zoning ordinances; rather, it speaks simply to "restrictions that impair a viewer's ability to receive video programming." The House Committee Report explains that this House-originated section was intended to "preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section."⁹

Congress' recognition of the impact of nongovernmental restrictions could not be more on point. Indeed, these sorts of quasi-public restrictions already have resulted in the de facto prohibition of access to certain types of satellite signals. Restrictive deed covenants, and the proliferation of Homeowners' Associations ("HOAs") with such restrictions in their bylaws, continue to erode significantly the rights of consumers to receive information and entertainment from diverse and competitive distribution technologies -- important federal rights that have been recognized by Congress and the Commission. Moreover, these quasi-public restrictions have the potential to completely frustrate federal communications policy without any guarantee that the strong federal interests have been

⁹ H.R. Rep. No. 204, 104th Congress, 1st Sess. 123-124 (1995).

weighed against the local concerns manifest in the covenants and by-laws.

PRIMESTAR, therefore, supports the Commission's proposal to amend Section 25.104 to add paragraph (f), which will prohibit enforcement of nongovernmental restrictions on small-antenna video reception equipment. PRIMESTAR believes such an amendment is mandated by Section 207 of the 1996 Act.

III. THE PROTECTIONS OF SECTION 207 SHOULD NOT BE CONFINED TO DBS ANTENNAS

PRIMESTAR submits that, consistent with Congress' intent, the Commission's rules mandating preemption of local regulation of small antennas should include not only antennas utilized by services that are technically classified as DBS, but also medium power DTH services such as those offered by PRIMESTAR that are technically part of the fixed satellite service. While the language contained in Section 207 specifically refers to "direct broadcast satellite services," PRIMESTAR agrees with the Commission's tentative conclusion that Congress did not intend for medium power DTH systems to face local regulatory burdens not shared by their DBS counterparts.

The legislative history of the 1996 Act indicates that Congress intended for Section 207 to apply to most providers of wireless video programming; among such services, only DTH

systems using large, C-band antennas were excluded.¹⁰ Based on this history, PRIMESTAR concurs with the Commission's reasoning that Congress intended antenna size to be a major variable to be considered in crafting preemption rules. While the substantial size difference between a C-band antenna and a DBS-type antenna may justify the preservation of some degree of local regulation, it does not follow that the minimal size difference between an 18-inch DBS antenna and a slightly larger fixed satellite antenna, used for medium power Ku-band DTH reception, should trigger differential treatment. Moreover, such a distinction would place PRIMESTAR, and other medium power Ku-band DTH providers, at a distinct competitive disadvantage, subjecting them to burdensome local regulation which their direct competitors utilizing high-power DBS satellites would avoid. Such a result is inconsistent with policy directives issued by Congress and the Commission, which evidence an intent to create a competitive DTH service.¹¹

PRIMESTAR submits, therefore, that the protection of Section 207 should extend to the reception of video pro-

¹⁰ Congress described the "direct broadcast satellite service" as "a specific service ... [which] does not include lower power C-band satellites, which require larger dishes in order for subscribers to receive their signals." *Id.* Therefore, Section 207 was designed not to preempt local requirements limiting "use and placement of C-band satellite dishes." *Id.*

¹¹ See, e.g., 1995 Cable Competition Report at ¶ 51.

gramming over any satellite antenna that is 1.0 meter in diameter or smaller, whether or not that antenna is used with a high power DBS satellite.

IV. THE COMMISSION SHOULD CLARIFY/REVISE CERTAIN OTHER ASPECTS OF ITS PREEMPTION RULE

In a pleading filed concurrently in this proceeding,¹² SBCA presents a number of recommendations for further clarification and/or revision to the Commission's preemption rules. As described below, PRIMESTAR concurs with the SBCA's proposals.

A. Exclusive Jurisdiction

PRIMESTAR agrees with the SBCA's view that the Commission should exercise its exclusive jurisdiction over DTH services pursuant to Section 205 of the 1996 Act. Moreover, the Commission should use its exclusive jurisdiction to bring national uniformity to regulations affecting DTH services. Because of the multitude of regulations (both governmental and private) of satellite antennas that exist throughout the country, it is imperative for there to be a central body, with the necessary expertise, that will be able to quickly adjudicate any and all issues that arise with respect to the regulation of DTH antennas and, in the process, create uniformity and guidance

¹² Petition For Reconsideration/Clarification And Further Comments Of The Satellite Broadcasting And Communications Association Of America ("SBCA Petition").

to local authorities and HOAs regarding the limited extent to which DTH antennas of 1.0 meter diameter or less may be regulated. Having the Commission perform this function will remove uncertainty in the minds of consumers regarding their rights to deploy DTH technology. A centralized authority with demonstrated expertise on the subject and a commitment to rapid resolution of issues will benefit consumers and regulatory authorities alike by providing a quick and inexpensive way to settle any matter that may arise.

B. Procedures

Closely related to the Commission's assumption of exclusive jurisdiction over disputes related to DTH antenna regulation, is a necessity for clear and simple procedures for resolving such disputes. Accordingly, PRIMESTAR supports the SBCA's suggestion that all declaratory rulings and requests for waivers of the preemption rules be placed on public notice followed by short, specified comment periods.

C. Waiver Standards

A per se preemption of government and private restrictions on the deployment of DTH antennas of 1.0 meter diameter or less would not preclude appropriate authorities from seeking a waiver of the preemption in appropriate circumstances. As the SBCA points out, however, the standards for grant of a waiver should be articulated clearly and precisely by the Commission. PRIMESTAR submits

that the SBCA proposed waiver standard strikes the appropriate balance -- i.e., that the regulation be "essential for preserving or protecting a highly specialized or unique feature of a geographic area," and that the boundaries and scope, respectively, of the geographic area and the regulation be "no broader than necessary" to preserve or protect the identified interest.

D. Retroactive Application

Finally, PRIMESTAR agrees with the SBCA that, if an authority sustains a waiver of the preemption and, accordingly, is permitted to regulate DTH antennas of 1.0 meter diameter or less, such regulatory authority should be given only prospective application. Under no circumstances should a consumer or DTH provider be required to remove a DTH antenna that has been purchased or installed prior to the time that a preemption waiver has been granted by the Commission.

V. CONCLUSION

PRIMESTAR submits that, in light of the federal interest in facilitating the distribution of satellite services, the dictates of Section 207 of the 1996 Act, and the absence of any compelling reason to retain any degree of local regulation of relatively small satellite antennas, a prospective approach to preemption relying solely on waivers is required in lieu of a retrospective system of rebuttable

presumptions. Further, PRIMESTAR submits that this per se preemption should be extended to all satellite antennas measuring one meter in diameter or less, regardless of whether the underlying satellite service is high-power DBS. Pursuant to Section 207 of the Telecommunications Act of 1996, the Commission should apply the per se preemption both to governmental and nongovernmental restrictions on the deployment of small satellite antennas. Finally, certain aspects of the Commission's preemption rules require modification as heretofore discussed.

Respectfully submitted,

PRIMESTAR PARTNERS L.P.

By: B. J. Griffin
Benjamin J. Griffin
Kathleen A. Kirby

REED SMITH SHAW & McCLAY
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005-3317
(202) 414-9200

Its Attorneys

April 15, 1996

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To: The Commission

REPLY COMMENTS OF PRIMESTAR PARTNERS L.P.

PRIMESTAR PARTNERS L.P.

Benjamin J. Griffin
Kathleen A. Kirby
REED SMITH SHAW & McCLAY
1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005-3317
(202) 414-9200

Its Attorneys

May 6, 1996

SUMMARY

Pursuant to Section 207 of the Telecommunications Act of 1996, the Commission must act to ensure that consumers have access to a broad range of video programming delivery services, including direct-to-home ("DTH") satellite services. Further, the Commission's rules should be crafted to foster full and fair competition among different types of video programming delivery services.

While a massive number of local authorities and private land use concerns filed comments in this proceeding attempting to incite the Commission into withdrawing several of the important measures it has taken to strengthen its 1986 preemption policy, their arguments are unpersuasive, and ignore the federal interest in ensuring that consumers have access to competitive DTH providers. These commenters offer no documented health, safety, aesthetic or property value concerns applicable to satellite antennas 1.0 meter or less that would warrant retention of any degree of local control whatsoever over the deployment and use of these antennas.

Therefore, PRIMESTAR urges the Commission to exercise its exclusive jurisdiction over satellite services and to preempt all local restrictions on satellite antennas measuring 1.0 meter or less in diameter, regardless of whether the antennas are used with Part 100 DBS systems. The legislative history of the 1996 Telecommunications Act

makes it clear that Congress intended to include both Part 100 services and medium power DTH services that employ small antennas in directing the Commission to preempt local rules which impair the reception of such services. Any attempt to distinguish between these services would provide Part 100 competitors with an unjustified advantage, contrary to Congress' stated intent to foster competition among DTH providers.

A per se preemption approach is consistent with Congress's intent as expressed in the 1996 Telecommunications Act and its legislative history. Further, only a per se preemption will provide DTH subscribers with complete protection from unnecessary regulatory burdens, and afford the satellite industry the opportunity to become a viable competitor to existing video delivery systems. For the same reason, the Commission should adopt its proposal to extend a per se preemption to nongovernmental or quasi-public restrictions.

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